

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KANNAN M. KRISHNAN,)	
)	No. 62804-6-I
Appellant,)	
)	DIVISION ONE
v.)	
)	
MATTHEW O'DONNELL,)	UNPUBLISHED OPINION
)	
Respondent.)	FILED: September 28, 2009
_____)	

AGID, J.—Dean Matthew O'Donnell did not reappoint Dr. Kannan Krishnan to an endowed chair at the University of Washington. Krishnan appealed that decision to a hearing panel, which apparently found that O'Donnell relied on a flawed review committee report when making his decision. But it concluded that his decision was not affected by impermissible or irrelevant considerations because his own review of Krishnan's qualifications provided an independent basis for his decision. Krishnan contends that the hearing panel's decision is not supported by sufficient evidence and is arbitrary and capricious. Because we cannot determine from the record whether the hearing panel found that the review committee report was merely flawed or was actually affected by irrelevant or impermissible considerations, we remand this matter to the

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hearing panel to conduct a fact-finding hearing.

FACTS

In 2001, Krishnan accepted an appointment as a tenured and full professor of materials science and engineering at the University of Washington's College of Engineering and the Campbell Chair, which is an endowed chair. The Chair's purpose is to enhance the University's ability to attract and retain distinguished faculty within the department of materials science and engineering.

The offer letter from Professor Rejendra Bordia, who was then chairman of the department of materials science and engineering, stated that the "Campbell Endowed Chair shall be for a period of up to five years, and shall be subject to review in accordance with University policy and procedures. It can be renewed. If the renewal is denied, you will have a minimum time period of one year . . . to vacate the Chair."¹ During appointment negotiations, Bordia conveyed to Krishnan that the University's reappointment policies and procedures involved review by a committee that would be set up by the dean and that would include review of all aspects of a faculty member's performance.

In 2005, the University codified the relevant reappointment policies and procedures in two documents. The Endowed Chair and Professorship Guidelines state that the purpose of endowed chairs is to "recruit and retain faculty with outstanding scholarly record[s]." The University expects endowed chair holders to have an "established record of outstanding intellectual achievement in research and education, as measured by scholarly activity, an international professional reputation, and a

¹ The Robert J. Campbell Endowed Professorship in Ceramic Engineering also states that "[e]ach appointment shall be for an indefinite period or a limited term, to be determined by the Dean, and shall be subject to review in accordance with University policy and procedures."

demonstrated ability for leadership.” The guidelines state that reappointment review

is based on the accomplishments of the [endowed chair] holder relative to the guidelines listed in this document and any particular guidelines relevant to that specific endowed position. Renewal of the appointment will be based on the guidelines outlined in the specific endowment agreement, on the recommendations of the review committee, and the decision of the Dean. A recommendation for renewal must be well established, based on specific accomplishments relative to the guidelines, with final approval being made by the Dean.

The Endowed Chair and Professorship Expectations document provides criteria for the review committee to use in evaluating the holder’s performance.² The review committee may also consider “any other criteria deemed applicable.” The expectations document also provides that “the review committees will consist of three members: two from other departments or units (one of whom will chair the committee), one from the holder’s department.”

In April 2006, the acting engineering dean, Mani Soma, appointed a three-person committee to review Krishnan’s reappointment. Soma provided the review committee with the Endowed Chair and Professorship Guidelines, the Endowed Chair and Professorship Expectations, and the Robert J. Campbell Endowed Professorship in Ceramic Engineering Agreement. Krishnan provided the review committee with a narrative of his accomplishments as the Campbell Chair holder and a copy of his

² The criteria are:

1. Enhance both academic and research programs in the holder’s department.
2. Establish and/or expand collaborative partnerships within the College of Engineering and in other units at the UW.
3. Establish and/or expand collaborative partnerships with industry and/or international partners.
4. Develop and/or refine teaching methods.
5. Develop innovative curriculum for both undergraduates and graduates.
6. Recruit and mentor students, both undergraduate and graduates.
7. Build and/or enhance the reputation of the holder’s department, the College of Engineering, and the UW.

curriculum vitae. Consistent with the endowed chair expectations, which encourage the review committee to consult with individuals at the University and other institutions to provide input on the chair holder's work, the review committee contacted twelve potential evaluators from outside the University and six from within. Six external and four internal reviewers evaluated Krishnan.

The review committee provided a unanimous and equivocal recommendation, concluding that "[a]lthough Krishnan's research and scholarship are very strong by some measures[,] it is not clear based on external letters that it is of the outstanding level expected for appointment to an Endowed Chair. His educational activities, service, and extra-departmental collaborations are adequate for this appointment. A continuation of this appointment may be justified." The outgoing engineering dean deferred the reappointment decision to Matthew O'Donnell, the incoming engineering dean. The review committee's report concerned O'Donnell because it did not support reappointment.

O'Donnell met with Krishnan to discuss the report and to inform him that he planned to conduct his own review before making a final reappointment decision. Krishnan provided O'Donnell with the names of 10 experts who could provide input regarding his scholarship. O'Donnell also contacted people inside and outside the university and received four lists of names. O'Donnell scheduled phone interviews with three of the reviewers who were common to all lists and three reviewers from Krishnan's list. O'Donnell interviewed two reviewers from his list and two from Krishnan's list.

O'Donnell asked each reviewer if they had read Krishnan's curriculum vitae and whether they were acquainted with his work. Then he asked each reviewer about Krishnan's standing in his field and whether he would have an endowed chair at the reviewer's institution. Three out of four external reviewers raised some concerns about Krishnan's contributions. O'Donnell decided not to renew Krishnan's appointment as Campbell Chair "[b]ased on the Review Committee's report and his own analysis of Krishnan's scholarly impact."³

Krishnan requested that Cheryl Cameron, Vice Provost for Academic Personnel, recommend that O'Donnell reconsider his decision. She declined, but she conducted a de novo review on behalf of the provost and found no basis to reverse O'Donnell's decision. Krishnan petitioned for review of O'Donnell's decision by a faculty hearing panel, alleging that the review committee failed to conduct its review in accordance with University procedures and that O'Donnell's review was ad hoc and arbitrary.

The hearing panel determined that the faculty handbook provided the applicable legal standard and required Krishnan to prove by a preponderance of the evidence that the decision to deny him reappointment was based on factors other than relevant and permissible considerations.⁴ The hearing panel found that the review committee's evaluation of external reviewers was flawed because the letters provided by external reviewers did not support the review committee's "generally negative opinion" of

³ O'Donnell testified that he reread the review committee report before making his decision.

⁴ The complete faculty handbook is not in the record, but the hearing panel quotes from section 28-32.B.3, which states that "[d]ecisions relating to merit or quality of the faculty member can be reviewed only to the extent necessary to determine whether the decision being questioned was affected by factors other than the relevant and permissible considerations in making the particular decision being challenged."

Krishnan's research and scholarship. The panel found that this flaw "suggests that its recommendation was affected by irrelevant or impermissible factors." According to the panel, the review committee's treatment of Krishnan's evaluations "indicates that it did *not* refer to a significant amount of *uniformly positive* input from both internal and external reviewers in its findings."⁵

In contrast to its more hedged findings, the hearing panel found that O'Donnell's decision "would have also been affected by irrelevant or impermissible factors" if he had accepted the review committee's recommendation "without more." And the hearing panel concluded that "the Review Committee ignored much relevant input in reaching its equivocal recommendation and failed to inquire further to clarify some inconsistent information." Because the hearing panel found that O'Donnell conducted an independent, impartial, and fair review of Krishnan's scholarship, which formed the basis for his non-renewal decision, it concluded that Krishnan did not prove that O'Donnell's decision was based on factors other than relevant and permissible considerations. But the hearing panel also concluded that "[b]ased on the Review Committee's report and his own analysis of Krishnan's scholarly impact, O'Donnell decided not to renew Krishnan's appointment as Campbell Chair."

Mark Emmert, the University of Washington's president, affirmed the hearing panel's decision. Krishnan petitioned for review of the agency action to the superior court, which dismissed his petition. Krishnan appeals.

⁵ The record supports the finding that there was a significant amount of uniformly positive input from internal and external reviewers. And the review committee report did not refer to all positive input.

DISCUSSION

The judicial review provisions of the state Administrative Procedure Act⁶ govern our review of the hearing panel's order.⁷ In reviewing administrative action, we sit in the same position as the superior court, applying the standards of the APA directly to the record before the agency.⁸ This court will grant relief if the hearing panel's order is not supported by substantial evidence based on the record before the panel.⁹ Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or correctness of the matter.¹⁰ We view the evidence and its reasonable inferences in the light most favorable to the prevailing party—here, the University of Washington—in the highest forum that exercised fact-finding authority—here, the hearing panel.¹¹ We will also grant relief from the hearing panel's order if it is arbitrary or capricious.¹² Under the APA, Krishnan bears the burden of proving the invalidity of the hearing panel's order on appeal.¹³

⁶ Ch. 34.05 RCW.

⁷ Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep't of Ecology, 146 Wn.2d 778, 789-90, 51 P.3d 744 (2002).

⁸ Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

⁹ RCW 34.05.570(3) ("The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that . . . (e) [t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court."). The superior court's findings of fact are not relevant. Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 100 n.11, 11 P.3d 726 (2000) ("Unless the superior court takes new evidence under RCW 34.05.562, its findings are not relevant in appellate review of an agency action.").

¹⁰ R & G Probst v. Dep't of Labor & Indus., 121 Wn. App. 288, 293, 88 P.3d 413, review denied, 152 Wn.2d 1034 (2004).

¹¹ Johnson v. Dep't of Health, 133 Wn. App. 403, 411, 136 P.3d 760 (2006).

¹² RCW 34.05.510(3)(i).

¹³ RCW 34.05.570(1)(a) ("The burden of demonstrating the invalidity of agency action is on the party asserting invalidity.").

I. Substantial Evidence Review

Krishnan contends that substantial evidence does not support the hearing panel's conclusion that O'Donnell's independent analysis cured the review committee's flawed report. Krishnan's reappointment was subject to review in accordance with University policy and procedures. University policy allows for review of decisions relating to faculty member merit or quality that are affected by factors other than the relevant and permissible considerations. The hearing panel found that the endowed chair guidelines and expectations contained the relevant and permissible reappointment considerations.¹⁴ The guidelines state that "[r]enewal of the appointment *will be based on* the guidelines outlined in the specific endowment agreement, *on the recommendations of the review committee*, and the decision of the Dean."¹⁵

Our review of the hearing panel's decision is hindered by inconsistent fact-finding with respect to crucial issues.¹⁶ For example, the hearing panel found that "[b]ased on the Review Committee's report *and* his own analysis of Krishnan's scholarly impact, O'Donnell decided not to renew Krishnan's appointment as Campbell Chair."¹⁷ But the hearing panel also concluded that O'Donnell's decision was not affected by the flawed review committee report because it found that the results of O'Donnell's

¹⁴ Krishnan points out that the University also has policies that govern promotion and tenure evaluations. But those policies do not apply here because this case involves an endowed chair reappointment decision, not a promotion or tenure review.

¹⁵ (Emphasis added.)

¹⁶ See Boeing Co. v. Gelman, 102 Wn. App. 862, 870, 10 P.3d 475 (2000) (holding that the hearing Board was required to decide what evidence is persuasive and why: "[f]ormal findings of fact serve an important function for meaningful judicial review of agency action"), review denied, 142 Wn.2d 1021 (2001).

¹⁷ (Emphasis added.)

independent review formed the basis of his reappointment decision. Both findings cannot be true at the same time: either O'Donnell relied on both or he only based his decision on his own independent review. Here, the evidence in the record would have been sufficient to support either conclusion had the hearing panel made one, but we cannot conduct meaningful judicial review without knowing which conclusion to review.¹⁸

Because University policies and procedure require O'Donnell to base his decision, in part, on the review committee's recommendation, a finding that O'Donnell did not base his decision on the review committee report supports a conclusion that O'Donnell did not follow University policies and procedures when he decided not to reappoint Krishnan. If O'Donnell in fact based his decision on both his review and the review committee report, which is the conclusion most strongly supported by the evidence, then his decision would have been partly affected by irrelevant or impermissible factors to the extent the review committee report was itself affected by irrelevant or impermissible considerations.

As the University correctly argues, the hearing panel found that the report's serious flaws *suggested* that the report *may have been* affected by impermissible or irrelevant factors. Unfortunately, the hearing panel also reaches an inconsistent conclusion, which is that O'Donnell's decision "would have also been affected by

¹⁸ The most likely conclusion is that O'Donnell relied on both the review committee recommendation and his own review when deciding not to reappoint Krishnan. But as the University points out, the hearing panel's finding that O'Donnell made his nonrenewal decision on the basis of his own review is entitled to substantial deference, and it is plausible, although unlikely, that a reasonable person could have concluded that the hearing panel discounted O'Donnell's testimony after assessing witness credibility.

irrelevant or impermissible factors” if he had accepted the review committee’s recommendation “without more.” Here, O’Donnell was required to base his decision, in part, on the hearing panel’s recommendation. Thus, if that recommendation was affected by impermissible factors, so would O’Donnell’s decision, even though he also did “more” by conducting an independent review. He cannot, under the procedural rules, ignore the review committee’s report altogether. The hearing panel also concluded that the review committee ignored relevant input, which would support a finding that it failed to base its recommendation on relevant factors as required. The evidence in the record does not rule out either conclusion,¹⁹ but the review committee report cannot both merely suggest impermissible considerations and be based on impermissible considerations at the same time. Accordingly, we remand this issue to the hearing panel for a finding on whether the review committee actually considered impermissible or irrelevant factors.²⁰

Krishnan also argues that other parts of the hearing panel’s decision are not supported by substantial evidence. First, he contends that the hearing panel should have gone into greater detail about the positive reviews the review committee received. But the hearing panel concluded that the review committee’s report “did *not* refer to a

¹⁹ As the University argues, no direct evidence in the record shows that the review committee based its recommendation on impermissible considerations, but a reasonable fact finder could also infer that the discrepancy between the positive letters and the merely equivocal conclusion resulted from consideration of impermissible or irrelevant factors.

²⁰ See RCW 34.05.562(2) (“The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if: (a) [t]he agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record.”).

significant amount of *uniformly positive* input from both internal and external reviewers in its findings” and that “[t]he generally negative opinion of the Review Committee of Krishnan’s research and scholarship is not supported by the letters supplied by external reviewers.” Those findings are both favorable to Krishnan and sufficiently supported by evidence of positive reviews in the record, which is what this court reviews under the substantial evidence standard. The APA does not require the hearing panel to provide an exhaustive recitation of every piece of evidence in the record.

Second, Krishnan argues that the hearing panel’s decision is not supported by substantial evidence because it failed to note all discrepancies between the review committee’s characterization of Krishnan’s reviews and what the reviewers actually wrote. But as mentioned above, the hearing panel found that the review committee’s report was flawed because “it did *not* refer to a significant amount of *uniformly positive* input from both internal and external reviewers in its findings.” Evidence of discrepancies between the review committee’s characterization of Krishnan’s reviews and reviewer’s evaluations supports this finding, which is also favorable to Krishnan.

Third, Krishnan argues that the hearing panel should have concluded that he received notice that his performance was consistent with expectations instead of finding that he had no notice that his performance was not consistent with expectations for the Campbell Chair holder. Even if a rational fact finder could have worded the panel’s finding differently consistent with the evidence in the record, we review whether the evidence in the record supports the facts found. Here, the evidence supports the

hearing panel's finding that Krishnan did not receive notice that his performance was not consistent with expectations,²¹ which is where our review ends. Additionally, the guidelines exist to communicate performance expectations to endowed chair holders. They do not require the University to notify the chair holder as soon as performance does not actually meet those expectations.

²¹ There is no evidence in the record that Krishnan received a negative performance evaluation during the time he held the Campbell Chair. And Krishnan testified that he expected reappointment to be "smooth sailing."

II. Arbitrary and Capricious Review

Krishnan argues that the hearing panel's decision was arbitrary and capricious because it relied on hearsay testimony from O'Donnell about his conversations with the reviewers he called. Hearsay evidence is admissible in adjudicative proceedings under the APA "if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs."²² Here, Krishnan did not formally object to O'Donnell's testimony, but he raised the issue of the reliability of O'Donnell's notes and memory during his cross-examination of O'Donnell. Accordingly, Krishnan, who was proceeding pro se, sufficiently objected to O'Donnell's testimony to preserve appellate review. But he fails to establish that a reasonably prudent person would not have relied on O'Donnell's testimony about what the reviewers, who could not have been cross-examined by Krishnan without revealing their identities, told O'Donnell in confidence about Krishnan's scholarly reputation.

Additionally, the hearing panel did not need to rely on O'Donnell's testimony about the out-of-court statements for the truth of the matter asserted because O'Donnell did not have to prove to the hearing panel what the reviewers told him. Instead, he only had to satisfy the hearing panel that his decision relied on relevant criteria, such as the quality of Krishnan's scholarship and his standing among world leaders in his field. O'Donnell testified that he asked reviewers to evaluate the quality of Krishnan's scholarship and his standing among world leaders in his field, which are relevant factors, and Krishnan was able to cross-examine O'Donnell about what he asked the reviewers to evaluate.

²² RCW 34.05.452(1).

Krishnan also asserts that O'Donnell's decision not to reappoint him was arbitrary and capricious under McDonald v. Hogness because the University did not employ adequate procedural safeguards to control arbitrary reappointment decisions.²³ In McDonald, an unsuccessful medical school applicant claimed the school's admission process and treatment of his application violated due process because the State delegated the authority to set admissions requirements to the Board of Regents without providing standards prescribing how to exercise that authority.²⁴ Unlike McDonald, which is a case about the proper delegation of legislative authority, this is an APA case. Accordingly, we are not reviewing the University's reappointment process or O'Donnell's substantive decision.

Instead, under the APA, we use the arbitrary and capricious standard to review the hearing panel's determination that impermissible or irrelevant factors did not affect O'Donnell's decision not to reappoint Krishnan. As O'Donnell correctly argues, the decision to reappoint an endowed chair is assigned to his discretion, although that does not give him the authority to make arbitrary decisions. Instead, he must base his decision on the review committee report and Krishnan's qualifications and achievements in relation to the criteria in the endowed chair guidelines and expectations. O'Donnell does not have the discretion to consider impermissible or irrelevant factors when making reappointment decisions. As long as O'Donnell followed University policies and procedures and considered permissible and relevant criteria, he acted within his discretion by determining that Krishnan was an outstanding

²³ 92 Wn.2d 431, 598 P.2d 707 (1979), cert. denied, 445 U.S. 962 (1980).

²⁴ Id. at 444.

scientist and professor, but not sufficiently outstanding to warrant the renewal of an endowed chair.

We remand this matter to the hearing panel for fact-finding on whether O'Donnell followed the requirement that he consider the flawed review committee report and, if so, whether his decision can stand.

Ajda, J.

WE CONCUR:

Dwyer, A.C.J.

Schindler, C.J.